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# AGING AND IN SEARCH OF HEALTHCARE: ACCESS TO EMPLOYER-PROVIDED RETIREE HEALTH BENEFITS WOULD BE DAMAGED FOR THE BOOMER GENERATION UNDER AN ERIE COUNTY INTERPRETATION

*Stephanie Ward\**

Every seven seconds one of the seventy-six million “baby boomers” in the United States turns fifty.<sup>1</sup> Between 2015 and 2025, when many members of the “baby boomer” generation reach age sixty-five, there will be sixty million possible retirees.<sup>2</sup> The statistics are staggering, and when combined with the trend of steep rises in health care costs, continuing employer involvement in providing retiree health benefits will soon reach a critical juncture. In 1996, the Society for Human Resource Management (SHRM) projected a number of trends, including rising health care costs and demographic changes that will lead to a crisis in the provision of retirement benefits.<sup>3</sup> Then SHRM Board Chairman, Bruce Ellig, stated, “We are staring directly in the face of a retirement crisis unless we take action now.”<sup>4</sup>

Already on life support, employer-provided retiree health coverage would arrest under the Third Circuit Court of Appeals’ interpretation of the Age Discrimination in Employment Act (ADEA) in *Erie County*

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\* J.D. 2003, The Catholic University of America, Columbus School of Law; B.A., Politics 1990, Wake Forest University. The author thanks her family, friends and co-workers for their enduring support through four chaotic years of law school. The author also hopes that we will soon find a way of ensuring access to affordable, comprehensive health coverage for those post-employment, pre-Medicare individuals who are most likely to fall through the cracks and lose coverage today.

1. Jody Robinson, *The Baby Boomers’ Final Revolt*, WALL ST. J., July 31, 1998, available at <http://interactive.wsj.com>.

2. Weld Royal, *Countdown to the Great Labor Shortage*, N.Y. TIMES, Aug. 22, 2001, available at <http://www.nytimes.com>.

3. Press Release, Society for Human Resource Management, Retirement Crisis Looms Without a Strategy for Comprehensive Reform (March 12, 1996) (on file with the author). The Society for Human Resource Management, the leading voice of the human resource profession, represents the interests of more than 100,000 professional and student members from around the world.

4. *Id.*

*Retirees Ass'n v. County of Erie*.<sup>5</sup> In *Erie County*, the court extended ADEA workplace anti-discrimination protections to retiree benefits.<sup>6</sup> If adopted by other circuits, the Third Circuit's interpretation of the ADEA's effect on employer-provided retiree health benefits would require U.S. employers to provide a certain level of health coverage in a growing demographic and cost crisis that could compel employers to discontinue providing retiree health benefits entirely. The *Erie County* court's decision eliminates the flexibility that employers must retain in structuring benefit plans if they are to meet the needs of an older workforce and a greater number of retirees while containing higher health care costs. In other words, new ADEA legal obligations would backfire and deny seventy-six million baby boomers the benefit of employer-provided health coverage – whether they continue to work or when they retire.

This Note first describes the two most significant drivers of declining retiree health coverage in the Twenty-First Century: the rising cost of health care and the demographic shift toward a much older U.S. population. Part II discusses how the Third Circuit expands the ADEA's reach, threatening to create a new legal obligation for employers to provide a certain level of retiree health benefits. Part III shows how the *Erie County* court's ADEA interpretation is contrary to congressional intent and would compromise an employer's ability to continue to provide retiree health coverage. Finally, this Note concludes with the argument that by defining a new obligation on employers to provide a certain level of retiree health benefits, *Erie County* would perpetuate a common legal and moral presumption that employers are obligated to provide benefits. The end result would be to ultimately frustrate an employer's interest to help ensure that older Americans have access to affordable health coverage.

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5. 220 F.3d 193 (3rd Cir. 2000). The County and plaintiffs reached a settlement agreement approved by the United States District Court for the Western District of Pennsylvania in March of 2002, *Erie County Retirees Ass'n v. County of Erie*, 192 F. Supp. 2d 369 (W.D.Pa. 2002). In order to comply with the Third Circuit and District Court rulings to reduce the discrepancies between health plans offered to younger retirees and to the plaintiff retirees over age sixty-five, the County reduced benefits to younger retirees. *Id.* at 372. It eliminated the "point-of-service" plan offered to younger retirees and required them to accept a Health Maintenance Organization (HMO) plan similar to that offered to the plaintiffs, and also added a monthly charge equal to what plaintiffs pay in Medicare Part B premiums. *Id.*

6. See generally, *Erie County*, 220 F.3d at 193.

## I. HIGHER HEALTH CARE COSTS AND A GRAYING AMERICAN WORKFORCE WILL FORCE A TWENTY-FIRST CENTURY CRISIS IN EMPLOYER-PROVIDED RETIREE HEALTH BENEFITS

### A. *It's No Secret: The Cost of Health Care is Escalating*

Despite a period in the early 1990s when health insurance premium rates remained stable,<sup>7</sup> the cost of health care is now escalating and putting pressure on employers to reduce benefit levels and increase employee and retiree responsibility for their own health coverage. Health care premium costs increased an average of eleven percent in 2001,<sup>8</sup> and are predicted to rise an average of fourteen percent in 2002 – about four times the rate of inflation.<sup>9</sup> Smaller employers and their employees face even greater cost increases of twenty to thirty percent.<sup>10</sup> At the current rate, costs are expected to increase an astounding seventy-six percent over the next five years.<sup>11</sup>

Higher overall health care costs will have a detrimental impact on employer-provided retiree health coverage in this new century. As employers critically review their health benefits plans, they will protect active workers at the expense of retirees in containing costs. Already, employer-provided coverage for early retirees has dropped from a seventy percent high in the 1980s to just forty percent in 1997.<sup>12</sup> And although the percentage of current retirees with employer-provided coverage remained steady between 1994 and 1999 (fifty-seven percent of retirees ages fifty-

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7. U.S. GENERAL ACCOUNTING OFFICE, RETIREE HEALTH BENEFITS: EMPLOYER-SPONSORED BENEFITS MAY BE VULNERABLE TO FURTHER EROSION 6 (May 2001) [hereinafter U.S. GENERAL ACCOUNTING OFFICE].

8. *Retirement Security for the American Worker: Opportunities and Challenges Hearing Before the House Subcomm. on Employer-Employee Relations, Comm. on Education and the Workforce*, 107th Cong. 41 (2001) (statement of Patricia Neuman, Sc.D., Vice President of the Henry J. Kaiser Family Foundation), available at <http://www.gpo.gov/congress/house/house06ch107.html> [hereinafter *Neuman*].

9. Bill Brubaker, *Health Costs' Harsh Reality*, WASH. POST, Oct. 21, 2001, at H1.

10. *Id.*

11. Press Release, Hewitt Associates, Double-Digit Health Care Cost Increases Expected to Continue in 2002 (Oct. 29, 2001), at <http://was.hewitt.com/hewitt/resource/newsroom/pressrel/2001/10-29-01.htm> (on file with the author).

12. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 1.

five to sixty-four had employer-provided health coverage, and thirty-two percent of retirees sixty-five and older received supplemental Medicare benefits through their employer<sup>13</sup>), this stability may be deceiving and short-lived. Employers that have not eliminated retiree health benefits altogether are tightening eligibility requirements and increasing cost-sharing in premiums, co-payments and deductibles.<sup>14</sup> Other employers are implementing restrictions for future retirees.<sup>15</sup> The Employee Benefits Research Institute (EBRI) explains that “many current employees will never qualify for retiree health benefits because their employers offer them only to workers hired before a specific date.”<sup>16</sup> Employers cannot absorb consistently high cost increases and will continue to look for ways of containing health care costs while providing some form of health benefits.

*B. We May Not All Live in Florida, But Our Demographics Will Look Like Florida: The Impact of Changing Demographics on Health Benefits in the Workforce*

Rising health care costs are not the only pressures employers will face in providing benefit plans to their employees and retirees. A dramatic demographic shift alone would force changes in employer-provided retiree health coverage. The graying of America will make the Twenty-First Century U.S. workforce profoundly different than it was in the Twentieth

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13. *Retirement Security for the American Worker: Opportunities and Challenges Hearing Before the House Subcomm. on Employer-Employee Relations, Comm. on Education and the Workforce*, 107th Cong. 22 (2001) (statement of William J. Scanlon, Director of Health Care Services, U.S. General Accounting Office), available at <http://www.gpo.gov/congress/house/house06ch107.html> [hereinafter Scanlon].

14. *Id.* Older Americans also may feel the greatest impact of the loss of employer-sponsored plans in their prescription drug coverage. Employer-provided coverage is the main source of prescription drug coverage for older Americans, and tends to be more generous than what is provided in Medigap policies and in Medicare Choice plans. *Neuman, supra* note 8, at 39-40.

15. *Retirement Security for the American Worker: Opportunities and Challenges Hearing Before the House Subcomm. on Employer-Employee Relations, Comm. on Education and the Workforce*, 107th Cong. 60 (2001) (statement of Chip Kerby, Principal, William M. Mercer), available at <http://www.gpo.gov/congress/house/house06ch107.html> [hereinafter Kerby].

16. *Id.* at 9 (quoting Paul Fronstin, EBRI, *Employment Based Health Benefits: Trends and Outlook*, EBRI Issue Brief Number 233 (May 2001)).

Century.<sup>17</sup> By 2020, approximately twenty percent of the population will be sixty-five or older,<sup>18</sup> mirroring the current population of the state of Florida.<sup>19</sup> Americans are also living longer. Upon reaching sixty-five, Americans today can expect to live, on average, for more than sixteen years.<sup>20</sup> The fastest growing segment of the population is people over the age of eighty-five, an age group whose numbers will triple in forty years.<sup>21</sup> For employers, a larger retiree population will strain benefits plans. The need for health care services and benefits, such as treatment for chronic diseases or long-term care, increases with age.<sup>22</sup> With fewer employees working to support the costs associated with a greater number of retirees, employers will find these benefits more difficult to subsidize.<sup>23</sup>

Similar pressures could doom government health and income security programs. The effect of a growing retiree population on fewer active employees will severely strain the Social Security and Medicare systems.<sup>24</sup> The solvency of Medicare, particularly, is at risk because a growing retiree population and rising health costs will combine to make the program "fiscally unsustainable."<sup>25</sup> Social Security is expected to become insolvent in less than forty years, and dedicated tax revenues will exceed outgoing benefit payments in fifteen years.<sup>26</sup> Already, benefits are being reduced under Social Security. In 1983, Congress changed the normal retirement age for receipt of full Social Security benefits from sixty-five to sixty-seven

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17. RICHARD W. JUDY & CAROL D'AMICO, *WORKFORCE 2020* 6 (1997).

18. *Id.* at 5.

19. THE CONCORD COALITION, *SAVING SOCIAL SECURITY: A FRAMEWORK FOR REFORM, VOLUME 2: OPTIONS FOR REFORM* 4 (1998).

20. PRESIDENT'S COMMISSION TO STRENGTHEN SOCIAL SECURITY, *INTERIM REPORT* 14 (2001).

21. NAT'L COMM'N ON RETIREMENT POLICY, *CTR FOR STRATEGIC AND INT'L STUDIES, CAN AMERICA AFFORD TO RETIRE? THE RETIREMENT SECURITY CHALLENGE FACING YOU AND THE NATION* (1998).

22. See JUDY & D'AMICO, *supra* note 17, at 105.

23. Scanlon, *supra* note 13, at 27.

24. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 17-18.

25. *Medicare: The Need for Reform Hearing Before the House Committee on the Budget*, 107th Cong. 2, 3 (2001) (statement of The Hon. David M. Walker, Comptroller General of the United States, U.S. General Accounting Office), available at <http://www.house.gov/budget/hearings/walkerstmnt.pdf>.

26. Press Release, Social Security Administration, *Social Security Trust Funds: Long Range Deficits Remain* (March 26, 2002), at <http://www.ssa.gov/pressoffice/2002trustees.htm>.

by 2027.<sup>27</sup> Unless these programs are restructured now to reflect changing demographics,<sup>28</sup> benefits will be further reduced under the weight of the baby boomer generation.<sup>29</sup> Workers, then, who cannot afford to retire, because of lower government health and income security benefits, will remain in the workforce longer.<sup>30</sup> For example, a decline in Medicare benefits will force older employees to stay in the workforce longer so that they can retain coverage under their employer's health plan.<sup>31</sup> A greater number of older Americans will not be able to depend on government programs – namely Social Security and Medicare – for financial stability in retirement.

Uncertainty about the extent of the government's ability to meet the health and income security needs of retired individuals will shift the responsibility back onto employers. Whether by necessity or desire, more older Americans will continue working after they reach retirement age.<sup>32</sup> Sixty-one percent of employees expect to continue working post-retirement.<sup>33</sup> These older employees will require a different set of benefits to cover age-related conditions, such as hearing loss, arthritis and other chronic illnesses.<sup>34</sup> Planning for their eventual full retirement, older employees will also demand that their employers offer them retiree health coverage.<sup>35</sup> Consequently, employers will feel pressure to retrofit health benefits to meet the needs of an increasingly older workforce.

Americans' longevity also means changes in how society defines retirement. Older Americans may stay in the workforce longer, but they are likely to want more flexibility in their work hours, moving away from

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27. SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY FULL RETIREMENT REDUCTIONS BY AGE, at <http://www.ssa.gov/retirechartred.htm> (last visited Nov. 12, 2001). The normal retirement age is currently being phased-in to age sixty-seven for individuals born after 1959. Individuals born in 1938 or after can no longer retire with full Social Security benefits at age sixty-five, which also creates a situation where older employees may be forced to work longer.

28. JUDY & D'AMICO, *supra* note 17, at 106. Even if Congress devises a workable plan to restructure Medicare and Social Security, those changes could impact employer-provided retiree benefits. Most large employers tie their pension and health benefits to federal health and retirement benefits.

29. *Id.* at 87.

30. *Id.* at 94.

31. *Id.* at 106.

32. *Id.* at 103.

33. Carol Hirschman, *Exit Strategies*, HR MAGAZINE, Dec. 2001, at 53.

34. JUDY & D'AMICO, *supra* note 17, at 105.

35. *Id.* at 106.

the traditional forty-hour workweek, and access to some retirement benefits. Called “phased retirement,” this trend is redefining the retiree lifestyle and gaining in popularity among employers and employees.<sup>36</sup> Gradually transitioning to a full retirement could include options, such as, more flexible hours, working part-time or working as a consultant. A popular phased-retirement option, “retiree casual,” allows older workers to retire from a company and be rehired to work up to 999 hours per year while receiving full pension and health benefits.<sup>37</sup> Retiree casual, however, would only work if employers actually offer their retirees health coverage.<sup>38</sup> But, some phased retirement options, such as part-time or consulting work, often do not include comprehensive health benefits.<sup>39</sup> Providing sought after health coverage is the primary obstacle to employers offering flexible working arrangements to an aging workforce.<sup>40</sup> The *Erie County* court’s confining ADEA interpretation would further hinder employers from offering any form of health plan to gradual and full retirees at a time when employers need to adapt to a new workforce and accompanying workplace changes.

## II. EMPLOYERS MAY BE ENTERING A NEW DIMENSION IN HEALTH BENEFITS LITIGATION – AGE DISCRIMINATION – THREATENING TO CREATE A NEW OBLIGATION TO PROVIDE RETIREE A CERTAIN LEVEL OF RETIREE HEALTH BENEFITS THAT WILL HASTEN THE EROSION OF HEALTH COVERAGE FOR ALL OLDER AMERICANS

The competing trends of a rapidly growing elderly population and rising health care costs are creating tension in the employer-based health care system. This tension is being severely tested since the Third Circuit decided that the ADEA applies to retiree as well as active employee health coverage, and that distinctions in health benefits based on Medicare eligibility may violate the Act’s non-discrimination rules.<sup>41</sup>

The County of Erie, Pennsylvania, under pressure like most employers to contain rising health care costs, selected two separate managed care plans for their early retirees and retirees eligible for Medicare.<sup>42</sup> The plan

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36. Hirschman, *supra* note 33, at 53.

37. *Id.* at 55.

38. *Id.*

39. *Id.*

40. *Id.*

41. Kerby, *supra* note 15, at 59.

42. *Erie County*, 220 F.3d at 196-97.



offered to early retirees not eligible for benefits under Medicare was a “point-of-service” plan.<sup>43</sup> A traditional health maintenance organization (HMO) plan with coordinated care through a primary care physician was available to those eligible for Medicare hospital insurance who were also covered under Medicare Part B for outpatient care.<sup>44</sup>

Because retirees are eligible for Medicare at age sixty-five, the plaintiffs, who were ages sixty-five and older, claimed that the County discriminated against them on the basis of their age because their Medicare eligibility, determined by their age, defined their placement in a health plan inferior to the plan provided to younger retirees.<sup>45</sup> The Third Circuit agreed and found that Erie County had violated the ADEA.<sup>46</sup> Most important was the court’s determination and its instructions to the district court that this facial discrimination could not satisfy the standards of the “equal cost” prong of the ADEA’s “equal benefit or equal cost” principle that allows a safe harbor for employers to provide reduced benefits to older workers based on significant cost considerations.<sup>47</sup>

*Erie County* also ushers in a new era of retiree benefits litigation. Requiring employers to provide a certain level of retiree health coverage under the ADEA, especially with an aging population, could propel the number of age discrimination charges in the next half century beyond the over twenty-one percent per year already filed with the Equal Employment Opportunity Commission (EEOC).<sup>48</sup> Exposed to potentially large damage awards for providing a voluntary, and exceedingly costly, benefit to inactive, former employees, employers would rapidly terminate health benefits to a retiree population most in need of comprehensive coverage.

In addition to full retirees, the growing number of phased-retirees would not escape unscathed either. The Third Circuit’s decision and instructions to the lower court rejects the current understanding that employers are not legally required to provide retiree health benefits and employers can determine how their benefit plans are structured.<sup>49</sup> Employers that may have considered providing health coverage to part-

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43. *Id.*

44. *Id.*

45. *Id.* at 197-98.

46. *Id.* at 214.

47. *Id.* at 216.

48. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGE STATISTICS FY 1992 THROUGH FY 2001, at <http://www.eeoc.gov/stats/charges.html> (last visited August 26, 2002).

49. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7 at 3, 31.

time workers and other gradual retirees will be dissuaded by the Third Circuit's harsh terms and will not expose themselves to potentially costly litigation under the ADEA. Meeting the Third Circuit's lofty standard would be costly for employers and, in the end, detrimental to older workers and retirees.

*A. The Plain Meaning of the ADEA Is to Protect Active, Not Retired Workers*

Enacted expressly to protect older individuals seeking employment and older employees already on the job, the ADEA's statutory language provides that only active, not retired, workers are protected by its non-discrimination rules.<sup>50</sup> The Third Circuit's legal mandate on employers begins with its definitions of the terms "individual," "employee," "older worker," and "employee benefit" as used in the ADEA and in Congress' revisions of that law, the Older Workers Benefit Protection Act (OWBPA).<sup>51</sup> The *Erie County* court interprets these terms as referring not only to active workers, but also to retirees.<sup>52</sup> This interpretation conforms to neither a textual reading of the Act nor Congressional intent.

A textual reading shows that the ADEA refers only to current employees and their benefits while employed. Under the ADEA's prohibition against age discrimination, the term "individual" is used in the context of explaining that employers cannot discriminate against current or prospective employees, i.e., to "fail to refuse to hire...any individual"<sup>53</sup> or "to deprive any individual of employment opportunities"<sup>54</sup>. An employer cannot discriminate against an individual at hire or during employment "with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age..."<sup>55</sup>

50. See generally 29 U.S.C. at § 630(f) (2000).

51. See generally 29 U.S.C. at § 623.

52. See generally, *Erie Cty.*, 220 F.3d. 193. Section 4(a) of the ADEA, 29 U.S.C. §623(a), provides that it is

unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or] (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age...

53. 29 U.S.C. § 623(a)(1) (2000).

54. *Id.* at § 623(a)(2).

55. *Id.* at § 623(a)(1).

“Individual” encompasses a prospective and current employee so that the individual’s terms of employment are not compromised because of age either during the hiring process or while actively employed.

While “individual” refers to applicants and current employees in compliance with the ADEA’s purpose,<sup>56</sup> the term “employee” refers only to an active employee.<sup>57</sup> The statute defines an employee as “an individual employed by any employer.”<sup>58</sup> Accordingly, based on the statute’s plain meaning, an individual no longer employed by his employer is a former employee, or a retiree, and not an employee. The EEOC adopted this interpretation of “employee” in an earlier regulation, now repealed, stating that, “retirees are not embraced by the term employee.”<sup>59</sup> “Retiree” is also not defined in the ADEA. Because the Act’s purpose is to protect older individuals entering the job market and older employees currently employed, it is clear that the terms “individual” and “employee” in the ADEA cannot be construed to include retiree.

If the term “employee” in the ADEA only includes an active employee, then the term “employee benefits” cannot include retiree benefits. Employee benefits are granted upon hiring, provided during employment, and used by an employee while he or she is on the employer’s payroll. Employee benefits are not available to a former employee when he or she retires.<sup>60</sup> The ADEA refers to “employee benefits” only in the context of how they apply to an “older worker” as compared to a younger worker.<sup>61</sup> Retirees are not mentioned, and retirement is discussed only to state that the cost of providing benefits to older workers should not be used to force their early retirement or as an excuse to fail to hire an older individual.<sup>62</sup> The EEOC regulation interpreting this section of the ADEA also uses the specific term “older worker,”<sup>63</sup> not mentioning former employee or retiree. The plain meaning of the statute holds that post-employment benefits are not employee benefits within the context of the ADEA.

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56. See generally *Id.* at § 623(a) (stating the ADEA’s prohibition against age discrimination in employer practices).

57. *Id.* at § 630(f).

58. *Id.*

59. EEOC INTERIM REGULATIONS, 48 Fed. Reg. 26434 (June 7, 1983) *repealed* Pub. L. No. 101-239, 103 Stat. 2233 (1989) (1982 TEFRA provision that had required group health coverage to be offered under the same conditions to employees sixty-five and older as to those sixty-four and younger.).

60. 29 U.S.C. at § 623(a).

61. *Id.* at § 623(f)(2)(B)(I) (2000).

62. *Id.* at § 623(f)(2)(B)(ii).

63. *Erie County*, 220 F.3d 193 at 215 (referencing 29 C.F.R. § 1625.10(a)(1)).

*B. Congress' Intent In Enacting the ADEA and OWBPA was to Protect Older Workers From Discrimination In the Workplace, Not To Protect Former Employees and Their Post-employment Benefits*

The Third Circuit's holding not only misrepresents the plain meaning of the ADEA, but also ignores congressional intent in enacting the ADEA in 1967 and the OWBPA in 1990. Congress passed the ADEA to ensure that older Americans would be treated fairly when applying for employment, while working, and in all aspects of the terms and conditions of their employment. The Act's purpose hinges on the word "employment," not "retirement" – to "promote the *employment* of older persons based on their ability, rather than age; to prohibit arbitrary age discrimination in *employment*; to help employers and workers find ways of meeting problems arising from the impact of age on *employment*."<sup>64</sup> The ADEA and OWBPA were enacted to protect men and women over age forty who were either entering the workforce or actively employed, and not those individuals exiting the workforce. Former employees are not included in the class of individuals protected by the ADEA.

Buttressing this interpretation is the fact that, when Congress amended the ADEA to ensure that "all employee benefits" were covered under the Act, it did not intend to grant specific protections for retiree benefits. Congress' sole purpose was to overrule the U.S. Supreme Court's decision in *Public Employees Retirement System of Ohio v. Betts*,<sup>65</sup> which exempted all employee benefits from the ADEA's non-discrimination rules.<sup>66</sup> Congress approved the OWBPA in 1990, just one year after the *Betts* decision.<sup>67</sup> The OWBPA only clarified that the phrase "compensation, terms, conditions, or privileges of employment" does in fact include employee benefits that are subject to ADEA non-discrimination rules.<sup>68</sup> Retiree health benefits were not mentioned in the OWBPA provision.

The Congressional exchange during the OWBPA debate elaborates on the ADEA's original purpose to protect the employment of older workers. The Senate's report accompanying the committee-passed bill refers to the ADEA's legislative history which reveals a "specific and very limited purpose" to the law's exception for employee benefit plans – to ensure

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64. 29 U.S.C. § 621(b)(2000) (emphasis added).

65. 492 U.S. 158 (1989).

66. *Id.* at 161.

67. Pub. L. 101-433 (1990).

68. 29 U.S.C. § 630(1)(2000).

that employers are not discouraged from hiring older individuals.<sup>69</sup> Another purpose of the ADEA is to ensure that older workers continue working until they choose to retire, rather than being forced out of the workforce.<sup>70</sup> Democratic Senators Bentsen (TX) and Pryor (AK) engaged in a colloquy affirming that the ADEA “applies only to employees and those individuals seeking employment.”<sup>71</sup> Democratic Congressman Clay (MO) stated bluntly that “nothing in the bill would apply the provisions of the ADEA to retirees.”<sup>72</sup> Congress emphasized during debate and in report language that with this amendment it was only concerned about protecting older employees and older individuals seeking employment.

*C. The Third Circuit’s Interpretation of the ADEA’s Reach is Overly Broad and Inconsistent With the Law’s Purpose*

Notwithstanding congressional intent and the plain meaning of the statute, the Third Circuit broadly read the ADEA to apply not only to active workers, but also to retirees.<sup>73</sup> The court first defined the term “individual,” as used in the ADEA’s prohibition against discrimination,<sup>74</sup> to include all people, specifically retirees age sixty-five or older.<sup>75</sup> The term “individual” has been used in conjunction with “employee” to ensure inclusion of prospective and current employees under the Act’s protection.<sup>76</sup> However, the term is not associated with retiree. “Individual” is also not associated with “employee benefit plan” as used in the “equal benefit or equal cost” section of the ADEA.<sup>77</sup> After Senator Grassley (R-IA) expressed that under the Senate’s proposed OWBPA legislation, S. 1511, employers could still violate the law if employer-provided retiree medical benefits are reduced,<sup>78</sup> the final agreement changed the word “individual” to “worker” to further clarify that the ADEA only applies to current employees.<sup>79</sup>

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69. S. REP. NO. 101-263 at 9 (1990).

70. *Id.* at 19.

71. *Erie County*, 220 F.3d at 207.

72. *Id.* at 208.

73. *Erie County*, 220 F.3d at 217.

74. 29 U.S.C. § 623(a)(1) (2000).

75. *Erie County*, 220 F.3d at 208.

76. *See* 29 U.S.C. § 623(a)(1) (2000).

77. *See* 29 U.S.C. § 623(f)(2)(B)(i) (2000).

78. *Erie County*, 220 F.3d at 205.

79. *Id.*

The term “employee benefits” is also broad enough, said the court, to extend to retiree health coverage.<sup>80</sup> “Employee benefits” is an expression that can be inclusive of all benefits in a compensation package, including the opportunity for retiree health coverage. The court agreed with the EEOC in its amicus brief when it stated that Congress’ intent to prohibit discrimination in all employee benefits must be extended to post-employment benefits used by former employees.<sup>81</sup> The EEOC stated that retirees earned those benefits during active employment.<sup>82</sup> It did not correspond that Congress would then allow an employer to discriminate based on age with regard to a former employee’s benefits earned on the job yet prohibit the same regarding an active employee’s benefits.<sup>83</sup> The Third Circuit, then, supported the EEOC’s position that retiree benefits are part of the complete benefit package offered at hire and earned while employed.

For such an expansive definition, the Third Circuit also relied on the United States Supreme Court’s interpretation of “employee” in Title VII, in *Robinson v. Shell Oil Co.*<sup>84</sup> In holding that former employees are covered by Title VII’s anti-retaliation provisions, the Supreme Court found the terms “employed” and “employee” to be ambiguous and that they should be “construed ... in favor of Title VII’s broad remedial purposes.”<sup>85</sup> Therefore, the Court determined that the terms may apply to a current or former employee.<sup>86</sup> Because of the Supreme Court’s finding that an employer may retaliate against a former employee in violation of Title VII, the Third Circuit reasoned that an employer might also violate the ADEA when it treats retirees differently in their health coverage.<sup>87</sup>

However, the Third Circuit brushed over the fact that the Supreme Court cautioned that the word “employee” may not have the same

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80. *Id.* at 209.

81. *Id.* at 210.

82. *Id.*

83. *Id.*

84. *Id.* at 209. *See Also* *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *Robinson* involved a Title VII claim of retaliation against a former employee who had filed a claim against Shell Oil for racial discrimination. The Title VII anti-retaliation provision, the *Erie* court explained, is similar to that of the ADEA, and makes it unlawful “for an employer to discriminate against any of his employees or applicants for employment” because they have filed a discrimination charge. *Id.*

85. *Erie County*, 220 F.3d at 209.

86. *Id.*

87. *Id.*

meaning in all sections of Title VII.<sup>88</sup> Courts must look at the context in which a term is used within a specific section to determine its precise meaning in that section.<sup>89</sup> In the narrow context of Congress' intent to overrule the *Betts* decision, the term "all employee benefits" was added to ensure that benefits were subject to the ADEA.<sup>90</sup> Congress did not intend that its inclusion of "all employee benefits" would be defined to encompass retiree benefits.

The Third Circuit's interpretation, admittedly, dismisses legislative history in favor of its own view of the statutory language.<sup>91</sup> The court's interpretation actually conflicts with the Act's purpose. While retiree benefits may be part of a package of employer-provided benefits, the ADEA's explicit purpose in protecting older individuals seeking employment and older workers actively employed does not encompass post-employment retiree benefits. The context of the OWBPA debate was that in prohibiting discrimination in older workers' benefits, the OWBPA should not be drafted so that employers are prompted to discontinue offering retiree health benefits.

### III. THE THIRD CIRCUIT'S DECISION VIOLATES CONGRESSIONAL INTENT FAVORING EMPLOYER INVOLVEMENT AND COMPROMISES AN EMPLOYER'S ABILITY TO PROVIDE RETIREE HEALTH COVERAGE

Discontinuing the provision of retiree health benefits is already a real possibility as employers contemplate limited options of how they might have to comply with *Erie County*.<sup>92</sup> If most employers are forced to discontinue retiree health benefits,<sup>93</sup> retirees would be severely limited in their access to health coverage. There are few affordable health insurance options available to retirees beyond an employer's plan, especially if the individual is in ill health.<sup>94</sup> *Erie County* would compromise an employer's need for flexibility to address higher health care costs and a changing workforce. Congress clearly intended for the ADEA to apply only to protecting actively employed older workers. Congress did not intend to

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88. *Id.*

89. *Id.*

90. 29 U.S.C. §630(1) (2000).

91. *Erie County*, 220 F.3d at 210.

92. *See Kerby, supra* note 15, at 59-60.

93. *Id.* at 60.

94. *Scanlon, supra* note 13, at 28.

create obstacles to employer involvement in ensuring that retirees have adequate health coverage.

Law and public policy have consistently encouraged employers to provide health coverage to employees and retirees and allow them flexibility in determining the terms of their benefit plans.<sup>95</sup> As the U.S. population ages in a time of double-digit health care inflation, employers need more flexibility in the provision of health benefits to employees and retirees, not less. Senator Javits (R-NY), manager of the ADEA when it was originally debated on the Senate floor, discussed the importance of allowing employers the flexibility to deal with the higher costs of providing certain benefits to older employees.<sup>96</sup> Javits said that without any flexibility, and "faced with the necessity of paying greatly increased premiums," employers will look for excuses not to hire an older individual, which they might otherwise hire "under a law granting them a degree of flexibility with respect to such matters."<sup>97</sup> Impeding this flexibility would be detrimental to older Americans because employers are still the primary source of health coverage for workers and retirees ages fifty-five to sixty-four.<sup>98</sup>

Adding to health care cost considerations in providing health benefits to older individuals, Senator Hatch (R-UT) said during the OWBPA debate that an expanded and impractical legal obligation to retirees under the ADEA would divert employer funds from benefits to accounting for liability exposure and fending off age discrimination claims.<sup>99</sup> To compensate for this cost shift, retiree health coverage would likely be the first employer-provided benefit to be terminated.<sup>100</sup> Employers faced with age discrimination claims over retiree benefits would have less flexibility to provide any coverage. These same employers are also confronted with

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95. Brief of Amici Curiae Am. Ass'n of Health Plans, Inc. et al. at 5, *County of Erie, Pa., v. Erie County Retirees Ass'n*, 220 F.3d 193 (3rd Cir. 2000) (No. 00-906).

96. S. REP. NO. 101-263, at 9 (1990).

97. S. REP. NO. 101-263, at 9.

98. *Scanlon*, *supra* note 13, at 23.

99. 136 CONG. REC. S13,599, (Sept. 24, 1990) (statement of Sen. Hatch).

100. Amici Curiae, *supra* note 95, at 9. See, e.g., *Polaroid and Bethlehem Steel*, both facing bankruptcy, intend to substantially reduce retiree health care obligations. See *Neuman*, *supra* note 8, at 35. If so, employees of small businesses will experience the most immediate impact. Small employers will be less likely to offer health benefits, much less retiree health care, under the aegis of *Erie*. JUDY & D'AMICO, *supra* note 17, at 105.



new potential liabilities from a pending "Patients' Bill of Rights."<sup>101</sup> In combination with an *Erie County* interpretation of the ADEA, the cost of litigation exposure will further reduce an employer's benefits flexibility. As a result, large and small employers might rethink their involvement in retiree health care.

*A. By Enacting the OWBPA, Congress Ensured Application of the ADEA to Health Benefits But Also Recognized Cost Considerations Faced by Employers in Providing These Benefits to Older Workers*

The Third Circuit's interpretation of the ADEA shocked the employer community because the legislative histories of the ADEA and OWBPA extensively reference Congress' intent to uphold the practice of integrating Medicare benefits with those benefits offered under employer health plans. Congress passed the OWBPA in response to the *Betts* Court's decision, which had clearly violated Congressional intent regarding employer involvement in providing health coverage. Under the original ADEA exemption, a bona fide employee benefit plan providing reduced benefits based on age was ADEA exempt unless it was a subterfuge "to evade the purposes" of the Act.<sup>102</sup> The U.S. Department of Labor interpreted this language to exempt age-based reductions in benefit plans only if the reductions were based on "significant cost

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101. Bipartisan Patient Protection Act, S. 1052, 107th Cong. (2001); and Bipartisan Patient Protection Act, H.R. 2563, 107th Cong. (2001). A "Patients' Bill of Rights" has been on the legislative agenda since the early 1990's. The Health Benefits Coalition reports that exposing health plans and employers to huge damage awards would significantly increase the costs of health coverage. See HEALTH BENEFITS COALITION KEY EMPLOYER CONCERNS: PATIENTS' BILL OF RIGHTS (on file with the author). For example, a \$120 million award could cost employers the amount of premiums paid for over 55,000 participants, *Id.* The main obstacle to passage remains expanded liability for health plans and employers. In the 107<sup>th</sup> Congress, the House of Representatives passed their version of a "Patients' Bill of Rights," H.R. 2563, which included expanded liability for health plans and employers and limits on monetary damages. The Senate also approved a bill, S. 1052. The House and Senate bills differ in their treatment of liability, with the Senate McCain-Kennedy bill allowing lawsuits against health plans and employers in state court with little employer protection from exposure. President Bush threatened to veto legislation if it includes the Senate's more expansive liability, but supported the more limited-liability provisions passed by the House. See Amy Goldstein, *The Patients' Rights Fight, Round 2: Bills have Passed House and Senate, Now It Gets Rough*, WASH. POST, August 5, 2001, at A5.

102. 29 U.S.C. § 623(f)(2) (2000).

considerations.”<sup>103</sup> The purpose of this exemption was to allow benefits for older workers to be reduced to the point at which the cost to the employer of providing the benefit for older and younger employees was the same.<sup>104</sup> The Supreme Court in *Betts* rejected this “equal benefit or equal cost” principle.<sup>105</sup> Instead it stated that it could only reconcile the non-discrimination purpose of the ADEA with the exemption provision by interpreting it to exempt all employee benefit plans if those plans were not found to be a way of “discriminating in other, non-fringe benefit aspects of the employment relationship....”<sup>106</sup> Without legislative action in the form of the OWBPA to re-affirm Congress’ original intent, this decision would have had broad ramifications for older workers’ health benefits because it made age-based restrictions in health benefits valid absent a showing of discriminatory intent.<sup>107</sup>

Understanding these broad policy ramifications, Congress enacted the OWBPA to apply the ADEA to health benefits while continuing to allow an exemption for benefit reductions for older employees based on cost.<sup>108</sup> Congress eliminated the word “subterfuge” and codified the Department of Labor’s “equal benefit or equal cost” principle<sup>109</sup> (now enforced through the EEOC).<sup>110</sup> If a court finds age discrimination in employee benefits, employers can avail themselves of the ADEA’s “equal benefit or equal cost” safe harbor. If the benefits provided to older and younger employees are the same, or different, but the costs incurred are equal, the benefit plan is ADEA compliant.<sup>111</sup> The safe harbor provision allows employers to provide different benefits to older workers than to younger workers, “if the employer is spending the same amount, or incurring the

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103. *Betts*, 492 U.S. at 169, 170 (quoting 44 Fed. Reg. 30658-30662 (1979), codified at 29 C.F.R. § 860.120 (1980), redesignated at 29 C.F.R. § 1625.10 (1988)).

104. *Id.*

105. *See generally*, *Betts*, 492 U.S. at 158.

106. *Id.* at 177.

107. *Erie County*, 220 F.3d at 204 (citing *Auerbach v. Bd. of Educ.*, 136 F.3d 104,111 (1998)).

108. *Erie County*, 220 F.3d at 204.

109. S. REP. NO. 101-263, at 9 (1990).

110. Jim Quirk, *A Brief Overview of the Age Discrimination in Employment Act (ADEA)*, Society for Human Resource Management (Jan. 1993), available at <http://www.shrm.org/whitepapers/documents>.

111. *Erie County Retirees Ass’n v. County of Erie*, 140 F. Supp. 2d 466, 470 (2001).

same cost, for the benefit for older and younger workers.”<sup>112</sup> Employers can claim this defense only for benefits, like health, which are more costly to provide depending on age.<sup>113</sup> Employers have the burden of proving that the differences in benefits for older and younger workers are justified due to significant cost considerations.<sup>114</sup>

Congress’ codification of this exemption in the OWBPA furthered its intent to recognize that it is more costly to provide health benefits to older employees.<sup>115</sup> The OWBPA, therefore, granted employers continued flexibility in their provision of employee health benefits while ensuring that those benefits for older workers are protected by the ADEA.

*B. The “Equal Benefit or Equal Cost” Safe Harbor Is Upheld, But Erie Makes It Unlikely that a Health Plan Will Survive the “Equal Cost” Prong*

Just as the *Betts* decision could have negatively impacted health benefits for older employees, the *Erie County* decision could adversely affect employer-provided retiree health benefits. Coordination of employer-provided health benefits with Medicare is a long-standing employer benefits practice.<sup>116</sup> While health care costs and the number of older Americans are increasing, the number of active workers subsidizing the cost of retiree health care is decreasing.<sup>117</sup> In 2030, when the growing number of older Americans doubles,<sup>118</sup> employers will struggle to provide health benefits to the over-sixty-five population without the flexibility to distinguish Medicare-eligible retirees from early retirees. Thus, the most detrimental aspect of the *Erie County* decision was the court’s determination that differences in health benefits for older retirees also receiving Medicare benefits and non-Medicare eligible retirees is unlikely to satisfy the ADEA’s “equal cost” prong.<sup>119</sup>

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112. Timothy S. Bland, *New EEOC Guidance on Discrimination in Employee Benefits*, Society for Human Resource Management 3 (Dec. 2000) (on file with the author).

113. *Id.*

114. 29 C.F.R. § 1625.10(a)(1) (2002).

115. S. REP. NO. 101-263, at 21 (1990).

116. *Amici Curiae*, *supra* note 95, at 9.

117. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 17.

118. *Id.*

119. *Kerby*, *supra* note 15, at 59.

The Third Circuit stated that the “equal benefit or equal cost” safe harbor provides the necessary balance between an employer’s cost concerns and a retiree’s interests in adequate health coverage.<sup>120</sup> When providing guidance to the lower court on how to apply the “equal cost” prong of the standard, however, the Third Circuit stated that the court could not consider the costs incurred by Medicare in addition to those incurred by Erie County in determining whether an equal amount of money is being spent on benefits for older and younger individuals.<sup>121</sup> The court interpreted “cost to the employer” to mean direct costs incurred only by the employer.<sup>122</sup> It stated that the purpose of the “equal benefit or equal cost” standard was to ensure that the employer alone incurred the same cost for older and younger employees<sup>123</sup> despite the availability of another legitimate benefit source, such as Medicare. The court’s interpretation stops short of a complete analysis under the ADEA because it does not take into account the ADEA’s exception for government-provided benefits.<sup>124</sup>

*C. The Regulations are Explicit That Employers Do Not Violate the ADEA By Offsetting Benefits to Older Workers With Benefits Already Available Through Medicare*

ADEA regulations governing employee benefit plans permit an employer to include government-provided, age-specific benefits in the complete health benefit package it offers to older employees.<sup>125</sup> Specifically, “it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare.”<sup>126</sup> The EEOC’s interpretation of the regulations allows employers to “offset” the “amount” of benefits provided to older employees with benefits provided through Medicare.<sup>127</sup> The verb “offset” means to balance or compensate.<sup>128</sup> In the ADEA context, an employer need not provide a benefit that is

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120. See *Erie County*, 220 F.3d at 216.

121. *Id.*

122. *Id.*

123. *Id.*

124. 29 C.F.R. § 1625.10(e) (2002).

125. *Id.*

126. *Id.*

127. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL NO. 915.003 (2000), available at <http://www.eeoc.gov/docs/benefits.html>.

128. OXFORD ENGLISH DICTIONARY 738 (2d ed. 1989).

already being compensated by the government. This provision ensures that there is no wasteful overlap of benefits provided by employers and also by the federal government.

The United States District Court for the District of Rhode Island applied similar reasoning in *Gutchen v. Board of Governors of the University of Rhode Island*.<sup>129</sup> One year after *Erie*, the *Gutchen* court held that giving Medicare-eligible retirees a stipend lower than that given to early retirees to help them purchase health coverage under a voluntary retirement incentive plan did not violate the ADEA, in part because the regulations permit such distinctions based on Medicare eligibility.<sup>130</sup> The actual cost of health coverage for the sixty-five and older University retirees was offset by the government's contribution through Medicare.<sup>131</sup> To exclude the government's contribution and provide an equal amount of dollars in the stipend to the younger and older retirees would have resulted in greater benefits to the older retirees not required under the ADEA. As the court explained, "the ADEA was not intended to provide older workers with a windfall just because they are older."<sup>132</sup> Excluding Medicare from the "equal cost" calculation could result in greater benefits to older workers solely on the basis of their age.

Unlike the *Erie County* court, the EEOC also does not distinguish that it is only the type of benefit and not also the cost of the benefit that can be offset. In fact, when describing the purpose of this exception, the EEOC specifically states that offsets are meant to "avoid duplicative payments to older workers."<sup>133</sup> The only requirement specified by the EEOC when taking into account government-provided benefits is that an employer not deny an older worker a specific benefit offered to a younger employee just

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129. *Gutchen v. Bd. of Governors of the U. of Rhode Island*, 148 F. Supp. 2d 151, 159 (2001).

130. *Id.* The court's decision granting summary judgment to the Board of Governors of the University of Rhode Island also was based on the fact that this was a voluntary retirement incentive plan (VRIP). *See id.* at 156-57. Specific to early retirement plans, under the ADEA an employer must show that an early retirement plan is voluntary and furthers the purpose of the ADEA. *See* 29 U.S.C. § 623 (f)(2)(B)(ii) (2000). The court determined that the VRIP was voluntary because the plaintiffs sought to be included in the plan and had adequate time to review the plan. *Gutchen*, 148 F. Supp.2d at 157. It then determined that the VRIP serves the purpose of the ADEA because it does not discriminate based on age. *Id.* The plan was designed so that all retirees, regardless of age, were able to purchase the same medical coverage. *See id.* at 157-58.

131. *Gutchen*, 148 F. Supp. 2d at 157-58.

132. *Id.* at 161.

133. EEOC COMPLIANCE MANUAL, *supra* note 127. (emphasis added)

because it is not provided by Medicare.<sup>134</sup> As the EEOC Compliance Manual explains, the benefits combined must be “no less favorable” than those provided to a similarly situated younger employee.<sup>135</sup> This provision makes clear that a benefit plan for individuals over sixty-five will comply if the total benefit package, even if a combination of employer and government benefits, is similarly favorable for older and younger workers.

*D. Congress was Explicit that Integrating Medicare With Employer-Provided Health Benefits Would Not Trigger an ADEA Violation*

The *Gutchen* court’s interpretation of the ADEA as it applies to the inclusion of government benefits takes into consideration congressional support for Medicare integration that was dismissed by the *Erie County* court. Congressional support for Medicare integration is clearly demonstrated in the Senate’s committee report on the OWBPA. The Senate report states that “the Committee intends to approve the parallel practice of integrating retiree health benefits with Medicare, which is already permitted under the regulation.”<sup>136</sup> Republican Senator Hatch (UT) and Democratic Senator Metzenbaum (OH) both agreed that “coordination with government-provided benefits as specified by the EEOC guideline also would remain permissible.”<sup>137</sup> Senator Hatch continued that “[t]his is a positive practice which helps provide important protections for retirees.”<sup>138</sup>

There was no clear partisan division on this point. Both Democrats and Republicans agreed on a “Statement of Managers” for the Senate’s final bill, which clarified that even though the value of medical benefits for early retirees often exceeds the total value of benefits provided by Medicare and employers for those sixty-five and older, this difference is not prohibited.<sup>139</sup> Congress approved the practice of Medicare integration knowing that with the availability of Medicare benefits, health care premiums paid directly by employers for workers and retirees over sixty-five might be less than those paid for employees under sixty-five. Excluding those costs incurred by the government for Medicare, employers would no doubt fail the “equal cost” prong of the safe harbor

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134. 29 C.F.R. § 1625.10(e) (2002).

135. EEOC COMPLIANCE MANUAL, *supra* note 127.

136. S. REP. NO. 101-263, at 21-22 (1990).

137. 136 CONG. REC. 25,749 (1990).

138. 136 CONG. REC. 25,353 (1990).

139. *Id.*

provisions in *Erie County*. It is unreasonable to believe that Congress would approve a practice that it knew would be unlikely to meet the ADEA's standard.

The Third Circuit, paying lip service to Congressional intent, would make it impossible for employers to continue the legitimate practice of integrating Medicare benefits with retiree health coverage as intended by Congress.<sup>140</sup> Such a prohibition threatens an employer's continued involvement in providing some form of retiree health coverage and furthers the risk that employers will drop such coverage altogether. Consequently, in the wake of *Erie County*, Congressman Petri (R-WI) introduced legislation to affirm Congress' original intent that the reduction or elimination of medical benefits for a Medicare-eligible retiree does not violate the ADEA.<sup>141</sup> Also recognizing the implications of the *Erie County* Court's decision, Congressman Johnson (R-TX), Chairman of the House Education and the Workforce Subcommittee on Employer-Employee Relations, conducted a series of hearings during the 107th Congress on declining retiree health coverage.<sup>142</sup> If other courts adopt the Third Circuit's interpretation, Congress would likely actively develop legislation to re-establish Congressional intent.

Even the EEOC determined that *Erie County* would have a negative effect on the availability and affordability of health coverage for retirees. Approximately one year after the *Erie* decision, the Commission rescinded guidance it had erroneously issued suggesting that employers that reduce retiree health plan benefits because of Medicare eligibility were in violation of the ADEA.<sup>143</sup> Just as Congress expressed during the OWBPA debate, the Commission also expressed that it did not want to promote an interpretation of the ADEA that would discourage employers from providing retiree health coverage.<sup>144</sup>

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140. See *Erie County*, 220 F.3d at 214.

141. Teacher Voluntary Early Retirement Act of 2001, H.R. 2558, 107th Cong. (2001) (specifically applies to an early retirement incentive plan.)

142. *Retirement Security for the American Worker: Opportunities and Challenges Hearing Before the House Subcomm. on Employer-Employee Relations, Comm. on Education and the Workforce*, 107th Cong. 2 (2001) (statement of Rep. Sam Johnson, Chairman), available at <http://www.gpo.gov/congress/house/house06ch107.html>.

143. Karyn-Siobahn Robinson, *EEOC Rescinds Rule on Medicare-Eligible Individuals*, The Society for Human Resource Management, HR NEWS, August 2001.

144. *Id.*

With its unyielding interpretation of the ADEA, the *Erie County* court dismisses clear Congressional intent. The Third Circuit admitted that such an interpretation virtually eliminates any chance that retiree health benefits that take Medicare into account will ever meet the “equal cost” standard.<sup>145</sup> Indeed, Erie County conceded that under the Third Circuit’s instructions, it could not meet the “equal cost” prong, and on remand, the district court did not even consider it.<sup>146</sup> Such a prohibition threatens an employer’s continued involvement in providing some form of retiree health coverage and furthers the risk that employers will drop such coverage altogether.

#### IV. THE *ERIE COUNTY* COURT’S INTERPRETATION OF THE ADEA FRUSTRATES AN EMPLOYER’S INTEREST AND ABILITY TO VOLUNTARILY PROVIDE HEALTH COVERAGE

Despite the Third Circuit’s challenge to an employer’s legal and moral obligations to provide retiree health coverage, employer-provided health benefits remain voluntary. Employers, since World War II when wage controls were in effect, have offered health benefits to help companies recruit and retain employees.<sup>147</sup> The Employee Retirement Income Security Act (ERISA) gives employers that choose to offer benefits the flexibility to manage the structure, content and availability of their health benefit plans, including terminating plans.<sup>148</sup> The *Erie County* court’s application of the ADEA to retirees and its effective prohibition against considering Medicare benefits under the “equal cost” standard dismisses legislative history that encourages employer involvement by providing employers the flexibility to remain involved. Creating a new employer-to-retiree obligation under the ADEA to provide a certain level of health benefits will not establish better health care for retirees. Instead, it could force employers to eliminate coverage altogether. The court’s decision perpetuates the presumption that employers have a moral<sup>149</sup> and legal obligation to provide health coverage, thereby frustrating the interest of employers to voluntarily provide access to health coverage at all.

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145. *Erie County*, 220 F.3d at 216 n.15.

146. *Erie County*, 140 F. Supp. 2d at 477.

147. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 7, at 3.

148. *Id.* at 31.

149. OXFORD ENGLISH DICTIONARY 1068 (2d ed. 1989) (defining moral as “of or pertaining to character or disposition, considered as good or bad, virtuous or vicious; of or pertaining to the distinction between right and wrong, or good and evil, in relation to actions, volitions, or character of responsible beings; ethical.”).



*A. The Erie County Court Feeds the Presumption that Employers Have a Legal or Moral Obligation to Provide Coverage*

The *Erie County* court's decision may call into question the legal and moral obligation of employers to provide retiree health coverage. However, employers are neither required, nor do they have a moral imperative, to provide health benefits. Those who believe that employers have a moral obligation to do so rest their conclusion on the fact that an employer gains substantial tax benefit for providing health coverage.<sup>150</sup> Favorable tax treatment, however, does not make the provision of health benefits legally or morally mandatory. Tax benefits are an incentive, not a mandate, for employers to provide a socially desirable service, such as health benefits. Similarly, allowing for cost considerations in structuring retiree health benefits without violating the ADEA is also meant to encourage, not mandate, employers to voluntarily continue offering health coverage to retirees despite substantial cost pressures.

The *Erie County* court seems to forget that employer-provided health benefits are voluntary. The court seems to base its decision on a popular presumption that employers should provide, and that employees are entitled to, a specific level of health coverage.<sup>151</sup> If employees are entitled to coverage, employer benefits that take Medicare costs into account may be considered discriminatory if the integration results in an employer paying less for its older retirees than its younger retirees. Lost in this analysis is the fact that employer-provided health benefits remain a voluntary benefit to which no employee is entitled. The *Erie County* court's extension of the ADEA's prohibition against workplace age discrimination to retiree health benefits not only creates an obligation on employers to provide a certain level of benefits, but also encourages the incorrect assumption that employers have a legal and moral responsibility to provide benefits to employees and retirees.

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150. Dwight McNeill, *Transforming Employer-Sponsored Health Care*, 16 *BUS. & HEALTH*, no. 1, Jan. 1998, at 24.

151. See, e.g., Twila Van Leer, *Health Care Not a Right, Koop Says*, *DESERET NEWS*, March 7, 2002, at B1. Former U.S. Surgeon General, Dr. C. Everett Koop, said there is no constitutional right to health care. *Id.* However, public polls show that people have a strong perception that there should be a basic right - not only a basic right to any type of healthcare, but a right to the type of care that the wealthiest individuals might receive. Of course, a constitutional right to a "Cadillac" health plan for everyone would be very expensive, and employers, most likely, would have to pick up the tab. *Id.*

*B. An employer's Imperative to Provide Access to Health Coverage is Based on Cost Considerations and Maintaining Good Employee Relations*

Grappling with an aging American workforce, double-digit increases in health care costs and a growing number of uninsured,<sup>152</sup> employers have a bottom-line interest in helping to reduce costs and ensure access to affordable coverage.<sup>153</sup> Without employer involvement in determining the structure of the health care system, cost-shifting to insured employees due to the number of uninsured will continue.<sup>154</sup> As a result, the premium rates for employers and insured employees will rise and likely increase the number of the uninsured. Employers are also uniquely able to provide resources and insight as health care purchasers to tackle the enduring problems of access and affordability in the health care system.<sup>155</sup> As active participants in the health care system, employers should help find solutions to health coverage problems affecting their employees. But employers' and policymakers' thinking should not be limited to maintenance of a specific level of benefits, as the *Erie County* court insists.

An employer's interest in providing health benefits also extends beyond cost issues to promoting employee relations and retaining a productive workforce. Recruitment is still a battleground for employers where they must continue to use benefits to attract and retain good workers, including older individuals, to stem a long-term shortage of workers.<sup>156</sup> Older workers are also more likely than younger workers to demand adequate health benefits, even for the part-time or consulting work to which they are gravitating.<sup>157</sup> Employers trying to attract these workers will have to "sweeten the pot" with appropriate health benefits.<sup>158</sup>

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152. Vicki Kemper, *Unlikely Coalition Declares Health-Care Crisis*, L.A. TIMES, Feb. 13, 2002, at A30.

153. *See id.* (Business, labor unions, consumer groups and health care organizations joined in a \$10 million advertising campaign to raise awareness of the uninsured and promote finding solutions to provide greater access to health insurance.).

154. Tom Gilroy, *Business, Labor, Other Groups Form Coalition to Publicize Plight of Uninsured*, BNA DAILY REPORT FOR EXECUTIVES, Feb. 13, 2002, at A-13.

155. McNeill, *supra* note 150.

156. Alison Stein Wellner, *Tapping a Silver Mine*, HR MAGAZINE, March 2002, at 29.

157. *Id.* at 31.

158. *Id.*

As employers review their current benefits packages with an eye toward the changing workforce, the structure and composition of health benefits will also likely shift to providing more coverage for “senior” health concerns – such as chronic illnesses, like arthritis and poor hearing, and access to long-term care services. Long-term care, for example, is a growing need, but unavailable today under most private health insurance or through Medicare.<sup>159</sup> As the demand for coverage of long-term care services increases, so will the financial burden on individuals and the public health system.<sup>160</sup> Employers will see a recruitment and retention interest in responding to this demand and helping to provide access to affordable long-term care services. Under *Erie County*, however, employers would lose the flexibility to structure benefit options that take into account these different needs and greater costs of an older workforce. Ultimately, it is the retirees who will lose if employers are unable to provide older individuals access to health coverage that is more affordable and more tailored to their health care needs.

*C. Erie County Frustrates an Employer’s Interest and Limits an Employer’s Flexibility in Providing Health Coverage to the Detriment of Employees and Retirees, Particularly in a Workforce Where the Line Between Employee and Retiree is Blurring*

Retirement ages are becoming increasingly less predictable, as many Americans over age sixty-five continue to work because they are living longer.<sup>161</sup> With the concept of retirement changing, trying to maintain a certain level of benefits as would be prescribed by *Erie County* could come at the expense of older workers, particularly those who will be phasing-in their retirement.<sup>162</sup> If employers do not have the flexibility to combine the value of Medicare and employer-provided benefits for their over-sixty-five retirees without violating the “equal cost” prong of the ADEA safe harbor, the cost of providing care to pre-sixty-five retirees and older employees will increase. Employers then will not be able to afford to provide health benefits to the growing number of gradual retirees wanting to continue working, but on a more flexible schedule while maintaining access to some retiree benefits. Senator Heinz (R-PA) during the OWBPA debate stated that, “We must take steps now to eliminate policies which discriminate against older workers and, instead, develop

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159. *Scanlon, supra* note 13, at 30.

160. *Id.*

161. JUDY & D’AMICO, *supra* note 17, at 104.

162. See phased-retirement discussion *supra* Part I.B.

strategies that will assist businesses to encourage more workers to remain in the workplace, to remain productive, to be a national asset, and to help us move this country ahead."<sup>163</sup> Many older workers must or desire to remain in the workplace and remain productive, but this will become more difficult if employers are stripped of the tools that they need in order to respond to the changing workforce.

*Erie County* limits an employer's ability to contain costs and respond to the changing workforce. In order to comply with *Erie County*, an option for employers would be to provide the same managed care plan to older and younger retirees.<sup>164</sup> However, that may not be feasible across the U.S. because the same health plan may not be available to pre- and post-Medicare eligibles in all parts of the country.<sup>165</sup> Equalizing benefits or contributions for different sets of retirees is also unlikely because employer subsidies would have to be reduced for some retirees and increased for others.<sup>166</sup> Employers that do not eliminate retiree health coverage altogether for future retirees may try to equalize the cost of Medicare-eligible and early retiree benefits by requiring greater cost-sharing by early retirees. Approximately forty-two percent of large employers in 1999 required early retirees to pay 100 percent of their health insurance premiums, an increase from thirty-one percent in 1997.<sup>167</sup> Employers are also imposing greater cost-sharing in the form of strict minimum service requirements on employees to qualify for retiree benefits, tying the premium amount to the employee's length of service and instituting an annual cap on the company's premium contribution.<sup>168</sup> *Erie County* only frustrates an employer's ability to continue to offer some form of retiree health coverage in an already constricted health care market. *Erie County* would compel employers to further shift costs to early retirees or eliminate coverage for Medicare-eligible retirees. The result for older Americans is fewer affordable health coverage options.

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163. 136 CONG. REC. S13, 601 (1990).

164. *Kerby*, *supra* note 15, at 59-60.

165. *Id.*

166. *Id.*

167. Julie Appleby, *Health Benefits for Retirees Continue Decline. Court Ruling Won't Help as Employers Offer Less Coverage*, USA TODAY, May 31, 2001.

168. Press release, Watson Wyatt Worldwide, Companies Accelerating Cutbacks in Retiree Health Benefits, Watson Wyatt Study Finds (Sept. 16, 2002).

## CONCLUSION

The Third Circuit has greeted the Twenty-First Century with a new challenge to the voluntary nature of employer-provided health benefits. By expanding the ADEA and OWBPA to reach retiree health benefits, the court created a new cause of action for former employees over age sixty-five to claim facial discrimination under a law designed to protect older individuals entering the workforce, not leaving it. By virtually prohibiting an employer from taking Medicare benefits into consideration when determining whether it meets the “equal cost” prong of the “equal benefit or equal cost” safe harbor, the court reduces employer flexibility in benefits design at a time when it is most needed.

Health care costs are the highest in a decade, the workforce is rapidly aging, and how “retirement” is defined is changing. Employers and policymakers will need to decide how best to provide new categories of workers and retirees with adequate health coverage. The federal government should promote policies that encourage employers to offer appropriate health benefits to the increasing number of older workers who are entering retirement gradually. Employers also should be encouraged to bridge the health insurance gulf between age fifty-five and sixty-five, where younger retirees are caught without access to any affordable health coverage.

These employers may find themselves in violation of the ADEA, however, and stripped of their ability to respond to new workforce and health coverage needs under a broad adoption by the circuit courts of the *Erie County* court’s decision. The implication of *Erie County* goes beyond whether Medicare benefits are appropriately included in the cost of a retiree’s health plan to satisfy the ADEA safe harbor. The decision could threaten future cost containment and benefit design strategies necessary to prevent the seventy-six million aging baby boomers from becoming the next seventy-six million uninsured.